Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ROBERT STEICHEN,
Petitioner

v.

STATE OF SOUTH DAKOTA

On Petition For Writ Of Certiorari
To The South Dakota Supreme Court

PETITION FOR WRIT OF CERTIORARI

Rodney Freeman, Jr.
Counsel of Record
Kent A. Shelton
Churchill, Manolis, Freeman,
Kludt & Shelton
333 Dakota Ave. South
Huron, South Dakota 57350
(605) 352-8624

27pp

Robert Steichen was indicted on three (3) counts of rape in the first degree, seven (7) counts of rape in the third degree, and one (1) count of sexual contact with a child under sixteen (16). The trial judge ruled that prior bad act evidence, which is governed by Rule 404 (b) of the Federal Rules of Evidence, was admissible in the State's case-in-chief, because use of the evidence was consistent with the following exceptions to this exclusionary rule: motive, common plan or scheme, opportunity, absence of mistake or accident and continuing course of criminal conduct. The prosecution called fifteen (15) witnesses in its case-in-chief, of which, twelve (12) testified concerning prior bad acts, with only six (6) prosecution witnesses actually testifying with regard to the charges for which Steichen was being tried. Steichen was convicted on all counts.

Did the trial court err in allowing prior bad acts evidence to be utilized by the prosecution in its case-in-chief against Robert Steichen?

On June 19th, 1997, Circuit Court Judge Ronald K. Miller granted the State's motion admitting evidence of Defendant's prior bad acts. The South Dakota Supreme Court affirmed said ruling in its opinion dated December 23, 1998. The South Dakota Supreme Court denied Defendant's request for a rehearing on February 2, 1999. Pursuant to 28 § 1257, this Court has jurisdiction to review on a writ of certiorari the order in question.

The statute in question in this matter is SDCL § 19-12-5, which correlates with Rule 404 (b) of the Federal Rules of Evidence. SDCL § 19-12-5 states, "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident", while Federal Rule of Evidence 404 (b) similarly states "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon the request of the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

FACTS

Steichen was charged with the following alleged acts: 1) In July 1996, KC, the family babysitter, alleged Steichen kissed her, fondled her breasts, and penetrated her vagina with his fingers; 2) in the middle of July 1996, Steichen allegedly penetrated her vagina with his fingers, sucked on her breasts, kissed her, and penetrated her vaginally with his penis; 3) also in the middle of July 1996, Steichen allegedly kissed her, fondled her breasts, told her he loved her, and penetrated her anus with his penis; 4) in August of 1996, KC claims Steichen kissed her, told her he loved her, fondled her breasts, and penetrated her vaginally with his penis; 5) in the middle of August 1996, Steichen allegedly fondled her breasts and attempted to penetrate her vagina with his fingers; 6) also in August 1996, KC asserts Steichen fondled her breasts and forced her to perform

fellatio; 7) in December of 1996, KC claims Steichen kissed her, told her he loved her, fondled her breasts, and penetrated her vaginally with his penis; 8) in January 1997, KC stated Steichen kissed her, fondled her breasts, and penetrated her vaginally with his finger; 9) HF, who was six (6) at the time of the alleged incidents, claimed that Steichen penetrated her mouth with his penis; 10) HF alleged that Steichen penetrated her anus with his penis; and 11) HF also alleged that Steichen penetrated her anally with his penis. These are the acts for which Steichen was charged.

The State introduced evidence at trial concerning several alleged prior bad acts by Steichen, which are not related to the charged incidents. Not only did they call alleged victims of prior bad acts as witnesses, but the State also called third parties to testify concerning alleged prior bad acts. The evidence concerning prior bad acts included: 1) HF testified Steichen forced her to perform fellatio; 2) HF testified Steichen had anally sodomized her more than once; 3) MF testified that, when she was eight and eleven or twelve, Steichen kissed her, fondled her breasts, touched her vagina with his fingers, and performed cunnilingus on "a lot more than ten" occasions; 4) MF also testified concerning Steichen striking her, her sisters, and her mother; 5) LR, a former babysitter, testified that when she was fourteen (14), she had consensually allowed Steichen to vaginally penetrate her with his penis; 6) LR testified that, on another occasion, Steichen performed cunnilingus upon her and vaginally penetrated her with his penis; 7) LR also testified about Steichen striking his wife; 8) CP, a former step-son, testified that when he was six (6), Steichen performed fellatio upon him and penetrated his anus with his penis; 9) KC testified that Steichen fondled her breast; 10) KC also testified that Steichen struck the children and his wife while pregnant; 11) BC, a babysitter, testified Steichen rubbed her vaginal area above the underwear, 12) BC also testified Steichen grabbed a breast, attempted to kiss her and asked her to pull down her pants; 13) Dr. Gaede testified as to the physical condition of MF and statements made by MF that Steichen had raped her; 14) BS, a daughter, was called to testify, but was unresponsive to questioning; 15) Mary Vaughn, BS's social worker, testified about statements BS made to her about Steichen penetrating her vaginally with his finger, forcing her to perform fellatio and penetration of her anus with his penis; 16)

Sandra Olson, BS's therapist, testified that BS told her Steichen had touched her pee-pee; 17) Barbara Blaedorn, CP's social worker, testified that CP told her that Steichen had performed fellatio upon him and that Steichen had penetrated him anally with his penis; 18) Phyllis Steichen, Steichen's wife, testified about MF's statement that Steichen had forced her to perform fellatio and that Steichen was doing bad things to her and HF; and 19) Phyllis Steichen testified that Steichen struck her and the children and that Steichen threatened to kill her.

This issue was first presented to the Court by a Motion for Admission of Defendant's Other Acts from the State. The issue was briefed and a hearing was held on May 29, 1997, where Steichen objected to the granting of said motion. The Motion was granted by the trial court. Steichen also objected to the introduction of the prior bad acts evidence at trial. The trial court overruled the objection. The trial court found that the prior bad act evidence was admissible at trial because it fell within all of the following prior bad act exceptions: motive, common plan or scheme, opportunity, lack of mistake, and a continuing course of criminal conduct. The trial court also determined the prejudicial effect of allowing the State to introduce prior bad act evidence to the jury did not substantially outweigh the probative value of the evidence. The South Dakota Supreme Court found admitting the prior bad acts evidence under the lack of mistake exception was error, but affirmed the trial court's other decisions.

A writ of certiorari should be granted in this matter, because a question regarding a rule of evidence has been decided in a manner which is in conflict with the federal rules of evidence and said decision has denied Steichen a fair and impartial trial. Steichen was inappropriately bombarded at trial with evidence regarding unproven prior bad acts. The State called fifteen (15) witnesses in its case-in-chief, of which, twelve (12) testified concerning prior bad acts, with only six (6) prosecution witnesses actually testifying with regard to the charges for which Steichen was being tried. The trial court failed to properly apply the prior bad acts exceptions under which it admitted the prior bad act evidence, but it also failed in its efforts to weigh the probative value of the evidence against the danger of unfair prejudice to Steichen. It is clear that prior bad acts of this nature are

highly inflammatory to a jury. The prior bad act evidence offered little or no insight into whether Steichen had committed the crimes for which he was charged. Steichen was denied the opportunity to receive a trial where he would be judged solely on the merits of the relevant evidence against him. The introduction of the prior bad act evidence allowed the prosecution to receive a guilty verdict by way of emotion rather than proof.

For the forgoing reasons, it is urged that this petition be granted.

Dated this 5 day of April 1999.

Rodney Freeman, Jr.
Counsel of Record

Kent A. Shelton
Churchill, Manolis, Freeman,
Kludt & Shelton
333 Dakota Ave. South
Huron, South Dakota 57350
(605) 352-8624

Index of Appendices

Appendix A	Decision of State Supreme Court
Appendix B	Decision of State Trial Court
Appendix C	Order of State Supreme Court Denying Rehearing

#20347-a-RAM
1998 SD 126

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

STATE OF SOUTH DAKOTA, Plaintiff and Appellee,

v.

ROBERT STEICHEN, Defendant and Appellant.

* * * *

APPEAL FROM THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT
AURORA COUNTY, SOUTH DAKOTA

* * * *

HONORABLE RONALD K. MILLER
Judge

* * * *

MARK BARNETT
Attorney General

ANTHONY M. SANCHEZ
Assistant Attorney General
Pierre, South Dakota
Attorneys for plaintiff
and appellee.

RODNEY FREEMAN, KENT SHELTON
and JEFF BURNS OF
Churchill, Manolis, Freeman, Kludt
and Shelton
Huron, South Dakota
Attorneys for defendant
And appellant.

* * * *

ARGUED SEPTEMBER 15, 1998
OPINION FILED 12-23-98

#20347

MILLER, Chief Justice.

[¶1.] Steichen appeals his conviction on several charges, including first-degree rape, third-degree rape, and sexual contact with a child under sixteen. We affirm.

FACTS

[¶2.] Steichen was charged in Aurora County with three counts of first-degree rape and in Jerauld County with seven counts of third-degree rape and one count of sexual contact with a child under sixteen. He pleaded not guilty on all counts. The judge granted Steichen's motion for consolidation, and all charges were tried in Aurora County.

[¶3.] The Aurora County charges arose out of Steichen's sexual acts against HF, his six-year-old stepdaughter. It was alleged that between January 10 and February 12, 1997, Steichen penetrated HF's anus and mouth with his penis. The acts all occurred at night in the Steichen home, when his wife Phyllis was away. HF testified that Steichen threatened to kill her if she told anyone what he had done to her.

[¶4.] The Jerauld County charges stemmed from Steichen's sexual acts against KC. The alleged act began in 1996, when KC was fourteen years old and baby-sitting Steichen's children and stepchildren, and occurred at night in the Steichen home while Phyllis was away. According to KC, in July of 1996, Steichen kissed her, fondled her breasts, and digitally penetrated her vagina. In the middle of July, Steichen again digitally penetrated KC's vagina, kissed her, fondled her breasts, and vaginally penetrated her with his penis. In another mid-July incident, Steichen fondled KC's breasts, penetrated her anally with his penis, kissed her, and told her he loved her. In August, Steichen kissed KC, told her he loved her, fondled her breasts, and penetrated her vaginally with his penis. Again in August, Steichen fondled KC's breasts and forced her to perform fellatio on him. In December, Steichen vaginally penetrated KC with his penis, kissed her, told her he loved her, and fondled her breasts. In January of 1997, Steichen kissed KC, fondled her breasts and digitally penetrated her vagina. KC also testified that Steichen told her he would kill her if she told anyone what he had done to her.

[¶5.] Prior to trail, the State filed a motion for admission of evidence of Steichen's "other acts." After a hearing, the trial court

granted the motion, finding the other acts evidence was relevant to show motive, common scheme and plan, opportunity, lack of mistake or accident, and continuing course of criminal conduct. The court further found that the probative value of the other acts substantially outweighed the potential for unfair prejudice.

[¶6.] Steichen was found guilty on all eleven counts. On the three counts of first-degree rape in Aurora County, he was sentenced to thirty years on count one, seventy-five years on count two, and to life imprisonment on count three. On the Jerauld County charges, Steichen was sentenced to eight years for one count of third-degree rape, fifteen years on each of six counts of third-degree rape, and fifteen years for the one count of sexual contact with a child under sixteen. Steichen is responsible for up to $35,000 in restitution for each victim for any counseling received.

[¶7.] On appeal, Steichen raises the following issues:

1. Whether the trial court abused its discretion in allowing other acts evidence to be admitted.
2. Whether the trial court erred in not allowing Steichen to confront MF concerning other sexual acts with HF

DECISION

[¶8.] **1. The trial court did not abuse its discretion in allowing other acts evidence to be admitted.**

[¶9.] Steichen argues the trial court abused its discretion in allowing other acts evidence to be admitted. We disagree.

a. *Other Acts Evidence*

[¶10.] Steichen would have us believe that fourteen witnesses provided other acts evidence at trial. Upon review of the record, however, we find that number to be inaccurate.[1] The other acts evidence admitted at trial included testimony from KC, the victim in the Jerauld County charges.[2] Other acts evidence also came from the testimony of two of Steichen's former stepchildren and two former baby-sisters.

[¶11.] KC testified that in June of 1996, Steichen was driving a van with his children, stepchildren and KS as passengers. Steichen asked KC if he could feel her breasts. When she refused, Steichen reached over, lifted her

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1. For example, Steichen claims BS testified as to Steichen's other acts. This is clearly not the case. BS denied that Steichen did anything bad to her and denied witnessing Steichen having done anything bad to anyone else. In fact, BS responded to most questions by simply shaking her head "no."

2. Steichen claims HF, the victim of the Aurora County charges, also provided other acts evidence. Our review of the record finds that HF testified to acts that are the basis of the current charges and not other acts.

shirt, and fondled her breasts. KC also witnessed Steichen strike his children, stepchildren and Phyllis when she was pregnant.

[¶12.] MF, HF's older sister and Steichen's stepdaughter, testified to sexual acts Steichen committed against her when she was between the ages of nine and eleven or twelve. These acts all occurred at night in the Steichen home when MF's mother was away from the home. She testified that Steichen touched her vagina with his fingers, performed cunnilingus on her more than ten times, fondled her breasts, and kissed her. Steichen told her he would kill her if she told anyone what he had done to her. MF also testified that Steichen had struck her, her sisters, and her mother.

[¶13.] LR, a former baby-sitter for Steichen's children and stepchildren, testified that, in June 1992 when she was fourteen years old, she had "consensual" sex with Steichen.[3] This occurred at night in the Steichen home, when Phyllis was hospitalized after giving birth to a daughter. Steichen kissed her and vaginally penetrated her with his penis. In 1993, Steichen and LR also had "consensual" sex in the home of one of LR's friends. Steichen penetrated LR vaginally with his penis and performed cunnilingus on her. LR also witnessed Steichen strike his wife.

[¶14.] CP, Steichen's former stepson, testified to acts that occurred in 1989, when CP was only six or seven years old. The acts occurred at night in the Steichen home. Steichen anally penetrated CP with his penis and performed fellatio upon him.

[¶15.] BC, a former baby-sitter for the Steichen children and stepchildren, testified that Steichen had sexual contact with her at the end of July or beginning of August 1996. BC was thirteen years old at the time. Steichen rubbed BC's vaginal area under her shorts, but above her underwear. He attempted to kiss her and grabbed one of her breasts. This took place at night in the Steichen home.

b. *Analysis*

[¶16.] A trial court's decision to allow the admission of other acts evidence will not be reversed unless the trial court abused its discretion. State v. Christopherson, 482 NW2d 298,300 (SD 1992). The review is "'not whether the judges of this court would have made an original like ruling, but rather whether we believe a judicial mind, in view of the law and the circumstances, could reasonably have reached that conclusion.'" Id. at 302 (quoting State v. Rose, 324 NW2d 894, 895-96 (SD 1982) (citation omitted)).

[¶17.] Evidence of a defendant's other crimes or acts is generally not

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3. Even though the act has been characterized as consensual, it is not possible for an individual under the age of sixteen to have consensual sex with someone who is at least three years older. See SDCL 22-22-1.

admissible, unless an exception can be met. SDCL 19-12-5; State v. Moeller, 1996 SD 60, ¶12, 548 NW2d 465, 471; State v. Chamley, 1997 SD 107, ¶9,568 NW2d 607, 611. The admission of other acts evidence is governed by SDCL 19-12-5, which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan , knowledge, identity, or absence of mistake or accident.

See State v. Ondricek, 535 NW2d 872, 873 (SD 1995). "[P]rior bad acts evidence is not admissible to show that, merely because a defendant committed a similar offense on another occasion, he has a propensity to commit the offense charged." Moeller, 1996 SD 60, ¶12,548 NW2d at 471 (citations omitted). However, it may be admitted for other purposes, such as those listed in the statute. State v. Champagne, 422 NW2d 840, 842 (SD 1988).[4]

[¶18.] Before other acts evidence can be admitted, the trial court must engage in a two-prong analysis:

> (1) Whether the intended purpose for offering the other acts evidence is relevant to some material issue in the case (factual relevancy); and
>
> (2) Whether the probative value of the evidence is substantially outweighed by its prejudicial effect (legal relevancy).

Ondricek, 535 NW2d at 873 (citing State v. Steele, 510 NW2d 661, 667 (SD 1994)).

[¶19.] Generally, "'it is preferable to delay the admission of [other acts] evidence until the defense rests.'" State v. Werner, 482 NW2d 286,290 (quoting United States v. Estabrook, 774 F2d 284, 289 (8thCir 1985)). Once the defense rests, the trial court is then in the "best position to determine whether the issue sought to be proved by the extrinsic evidence is really in dispute, and if so, to assess its probative worth and possible prejudicial effect." Id. However, admission of other acts evidence may be properly admitted during the State's case-in-chief. Id. ("[W]here it is made clear at the outset of the trial that the defendant's principal defense is lack of knowledge or intent, and thus the issue is unarguably in dispute, the government may introduce the [other acts] evidence in its case-in-chief."). "[T]he order of proof is within the sound discretion of the trial court[.]" Id.

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4. As evidenced by the language of the statute, "[t]he list of the exclusions in the statutes is not exhaustive[.]" Werner, 482 NW2d at 289.

(1) Relevancy

[¶20.] First, for other acts evidence to be admissible it must be relevant. Relevant evidence is "[e]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." SDCL 19-12-1; see State v. McDonald, 421 NW2d 492, 494 (SD 1988). Other acts evidence is admissible "as long as proof of the intended purpose is relevant to some material issue in the case." Champagne, 422 NW2d at 842 (citing State v. Dokken, 385 NW2d 493, 497 (SD 1986)). Here, the trial court determined that the other acts evidence was relevant to show motive, common scheme and plan, opportunity, lack of mistake, and continuing course of criminal conduct.

(a) Motive

[¶21.] Steichen argues the other acts evidence was not relevant to show motive. He relies on our statement in Moeller that "[t]he perpetrator's motive, to satisfy a sexual need, is also abundantly clear by proving the rape itself." 1996 SD 60, ¶36, 548 NW2d at 477 (citing 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 110 at 625 (2d ed 1994)). Moeller, however, can be distinguished from this case. In Moeller, forensic evidence was available to establish a rape had been committed. Id. There was evidence of anal and vaginal penetration and semen was in the victim's body, which "established the assailant's intent to commit rape." Id. The forensic evidence available in Moeller is not available here. Without that evidence, the intent to commit rape cannot be conclusively established. Therefore, evidence of Steichen's other acts was admissible to establish motive.

(b) Common Plan, Design or Scheme

[¶22.] Steichen also challenges the admission of other acts evidence under the common plan, design or scheme exception. He contends this exception is inapplicable because it encompasses modus operandi, which is used to identify the perpetrator, and identity is not at issue here. He further claims the other acts were not necessary for the commission of the acts charged. We disagree.

[¶23.] "'[C]ommon plan, design or scheme' refers to a larger continuing plan, scheme or conspiracy of which the present crime charged at trial is only a part and which is often relevant to show motive, intent, knowledge or identity.'" Ondricek, 535 NW2d at 875(quoting Champagne, 442 NW2d at 842). In addition, "'where the defendant denies doing the charged act, evidence of a common plan or scheme to achieve the act is directly relevant to refute this general denial.'" Id. (citing United States v. Weidman, 572 F2d 1199, 1202 (7thCir 1978), cert. Denied, 439 US 821, 99 SCt 87, 58

LEd2d 113 (1978)).

[¶24.] Steichen's defense is a complete denial of the crimes charged. This denial places his identity in issue. Moeller, 1996 SE 60, ¶15, 548 NW2d at 472. With identity in issue, the other acts evidence was properly admitted under the common plan, scheme, or design exception to refute Steichen's general denial. It was also properly admitted to establish Steichen's identity as the perpetrator, and to show his plan to sexually assault children with whom he had a close relationship. See Ondricek, 535 NW2d at 877 (other acts evidence admissible to show plan of "using family visits and recreational activities as a means to get his young nieces alone and sexually abuse them"); Christopherson, 482 NW2d at 391 (other acts evidence admissible to show plan to "develop situations which allowed [defendant] to have sexual contact with young boys"); State v. Perkins, 444 NW2d 34, 38 (SD 1989) (other acts testimony admissible to show plan "tp engage in sexual activity with very girls").

(c) Continuing Course of Criminal Conduct

[¶25.] We find evidence of Steichen's other acts was also properly admitted to show a continuing course of criminal conduct. See State v. Floody, 481 NW2d 242, 254 (SD 1992); see generally State v. Sieler, 397 NW2d 89 (SD 1986). Comparing the crimes for which Steichen is charged with the other acts evidence demonstrates the crimes charged are a continuation of Steichen's criminal conduct. In 1989, Steichen began sexually abusing young children who were present in his home. This abuse started with his stepson. This criminal conduct continued with his stepdaughters and young girls who were baby-sitters in the home. This eight-year course of criminal conduct continued until Steichen was arrested.

(d) Lack of mistake or accident

[¶26.] The trial court admitted other acts evidence under the lack of mistake or accident exception. Steichen argues that this exception is inapplicable because he denies the acts occurred. We find admitting other acts evidence under this exception was error, but does not reach the level of reversible error. See SDCL 23A-44-14 (stating "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded"); see also State v. Larson, 512 NW2d 732, 736-37 (SD 1994) (stating it was harmless error when the court failed to perform the probative value versus the potential for unfair prejudice balancing on the record). The error was harmless, because Steichen's case was not prejudiced by the trial court's decision. State v. Schuster, 502 NW2d 565, 570 (SD 1993) (stating that for the appellate court to find harmless error, the admission of the erroneous evidence must not prejudice the defendant's case). As we have already decided, the other acts evidence was properly admitted to establish

motive, a common plan or scheme, and continuing course of criminal conduct. To reverse on this issue would serve no purpose.

(2) Probative v. Prejudice

[¶27.] After the trial court determines the relevancy of the other acts testimony, it must then balance the probative value of the evidence against the potential for unfair prejudice. "Prejudicial evidence is that which has the capacity to persuade the jury by illegitimate means which results in one party having an unfair advantage. Evidence is not prejudicial merely because its legitimate probative force damages the defendant's case." State v. Barber, 1996 SD 96, ¶19, 552 NW2d 817, 821 (citing State v. Goodroad, 442 NW2d 246 (SD 1989)). Even though the admission of other acts evidence "will usually result in some prejudice," it will not be admitted only if that prejudice is unfair. State v. Titus, 426 NW2d 578, 580 (SD 1988).

[¶28.] Steichen claims the trial court did not adequately perform the balancing test, which resulted in his being unfairly prejudiced by the admission of other acts evidence. First, Steichen argues he was unfairly prejudiced by the admission of other acts evidence of a 1989 incident involving CP. He claims the other act was so remote in time that its probative value was substantially outweighed by its potential for unfair prejudice. However, when addressing the remoteness of prior acts evidence, this Court has stated that "determining the remoteness of other acts must realistically depend upon their nature." Perkins, 4444 NW2d at 38. There is no "rigid time limitation when determining whether bad acts are too remote." Ondricek, 535 NW2d at 877 (acts that occurred twenty years prior to the acts charged were not too remote); Werner, 482 NW2d at 290 (acts that occurred twenty-five years before charged acts were not too remote); Christopherson, 481 NW2d at 302 (acts that occurred seventeen years prior to acts charged were not to remote).

[¶29.] In this case, the 1989 incident involving CP was not too remote to have probative value. Steichen's plan was to sexually abuse children with whom he had a trust relationship. CP, as Steichen's stepson, fit into that plan. Shortly after Steichen sexually assaulted CP, Steichen's marriage to CP's mother ended. He no longer had an available victim and had to wait for another opportunity to sexually abuse young children. That opportunity came when he married Phyllis. The sexual abuse that started with CP continued with Steichen's new stepchildren and the children's baby-setters. The 1989 incident was the beginning of Steichen's plan to sexually abuse children and was of the same nature as the crimes charged.

[¶30.] Next, Steichen maintains the court's analysis of the similarities of the other acts with the acts charged was inadequate. We disagree. When a

court determines similarity, "'[e]vidence of prior acts need not be that of an identical offense but only 'of similar involvement reasonably related to the offending conduct.'" State v. Loftus, 1997 SD 94, ¶25, 566 NW2d 825, 830 (quoting State v. Pedde, 334 NW2d 41, 43 (SD 1983) (other citations omitted)). When analyzing the similarities in this case, the trial court found that "the prior acts were substantially similar and any dissimilarities [were] inconsequential."

[¶31.] In addition, the court found that "when considering the specific and overall prior acts, their similarity, their occasions and locations, and their nature, it is apparent that their probative value substantially outweighs the potential for unfair prejudice." We agree with the trial court and hold that, though not identical, Steichen's other acts are similar to the charged offenses in a number of ways: (1) the acts were all against young children with whom he had developed a trust relationship, baby-sitters and his stepchildren; (2) the acts occurred when his spouse was away or asleep; (3) the acts occurred at night; (4) the acts occurred in the Steichen home, except for the van incident with KC and one act of sex with LR; and (5) the victims of Steichen's other acts were subject to sexual abuses of the same nature as the crimes charged. Even though not every victim was abused in the same way, the acts were sufficiently similar.

[¶32.] In addition, in balancing the probative value of the prior acts evidence against the potential for unfair prejudice, the trial court considered the availability of other evidence. See, e.g., State v. White, 538 NW2d 237, 243 (SD 1995) (in balancing the "probative value against undue prejudice," the court found "substantial need" to offer evidence of defendant's entry into victim's home when no other evidence was available on the issue). The trial court found there was no other evidence "of equal probative value...that could be introduced to prove the charges contained in the indictment." We agree. The physical evidence needed to prove the crimes charged was limited, so admitting other acts evidence was proper.

[¶33.] Moreover, we find Steichen's contention that the balancing test was inadequately performed to be without merit. Nothing in the record supports this contention. Our review of the record shows the court had sufficient information before it to adequately perform the balancing test. When performing the balancing, the trial court entered findings of facts and conclusions of law. See, e.g., Barber, 1996 SD 96, ¶29, 552 NW2d at 822. The court clearly stated the exceptions under which the evidence could be admitted and instructed the jury as to the purposes for which the other acts testimony could be used. See Werner, 482 NW2d at 290. The trial court followed the necessary procedures to determine if the probative value of the other acts evidence was substantially outweighed by the potential for unfair

prejudice. The court found it was not. We agree.

[¶34.] In summary, the trial court did not abuse its discretion in admitting other acts evidence. It determined the other acts evidence to be relevant to show motive, common plan or scheme, opportunity,.and continuing course of criminal conduct. It balanced the probative value against the potential for unfair prejudice, and found that the potential for unfair prejudice did not substantially outweigh the probative value. It committed no error in admitting the testimony.

[¶35.] **2. The trial court did not abuse its discretion by not allowing Steichen to confront MF concerning prior sexual acts with HF.**

[¶36.] Steichen argues that the trial court abused its discretion by not allowing him to cross-examine MF about her prior sexual behavior with a sibling.[5] He claims that the limit the trial court placed upon the cross-examination did not allow him to impeach MF's credibility "by exploring an area which could have revealed exculpatory evidence concerning the current charges." We do not agree.

[¶37.] "[T]he trial court retains broad discretion concerning the limitation of cross-examination and it will be reversed only when there is a clear shoeing of abuse of the discretion and a showing of prejudice to the defendant." State v. Koepsell, 508 NW2d 591, 595 (SD 1993) (citing United States v. Crump, 934 F2d 947, 951 (8thCir 1991)) (other citations omitted). The defendant has the burden of establishing that "a reasonable jury probably would have a significantly different impression if otherwise appropriate cross-examination had been permitted." Id. At 595 (citing Delaware v. VanArsdall, 475 US 673, 680, 106 SCt 1431, 1436, 89 LEd2d 674, 684 (1986); State v. Bogenreif, 465 NW2d 777, 782 (SD 1991)).

[¶38.] Steichen cannot establish that he was prejudiced by this limitation on cross-examination. He was allowed to cross-examine MF in other areas, which provided the jury with the opportunity to determine her credibility. Steichen has not established that the jury would have had any other impression had this cross-examination been allowed.

[¶39.] In addition, MF's testimony in this area is irrelevant. The alleged conduct did not involve HF, but involved BS. The trial court found the alleged conduct was "not even in the same category as the allegations that have been charged or alluded to or stated as other acts." We agree and hold--

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5. Steichen initially claimed MF had used a toothbrush to sexually assault HF anally. Because of this assault, he argues his cross-examination was "crucial" to determine MF's credibility and to determine if MF, and not Steichen, may have caused HF's injuries. In his reply brief, Steichen notes the "toothbrush incident" did not involve HF, but involved BS whose injuries were not an issue.

#20347
that the trial court did not abuse its discretion by limiting Steichen's cross-examination of MF.
[¶40.] Affirmed.
[¶41.] KONENKAMP and GILBERTSON, Justices, concur.
[¶42.] SABERS and AMUNDSON, Justices, dissent.
SABERS, Justice (DISSENTING).
[¶43.] I respectfully dissent. The trial court improperly allowed the State to bombard the jury with other acts evidence in its case-in-chief. The other acts evidence was not relevant to a material issue in the case and was highly prejudicial. We should reverse and remand for a fair trial.
[¶44.] Motive was not a material issue. State v. Werner, 482 NW2d 286, 297 (SD 1992) (Sabers, J., dissenting). The majority claims motive was relevant to prove intent. See ¶21 of the majority opinion. However, intent is not in dispute when the defendant denies the touching occurred. State v. Ondricek, 535 NW2d 872, 878 (SD 1995) (Sabers, J., dissenting) (citations omitted). At a minimum, the trial court should have deferred the other acts evidence until intent became an issue. Id. (Citations omitted).
[¶45.] The trial court also allowed the State to use other acts evidence to prove a common plan or scheme and a continuing course of criminal activity. Steichen's identity was not in issue; the victims were clear about who had committed the alleged crimes. Steichen's defense was that he did not commit the charged acts, not that he was wrongly identified as the person who did. State v. Champagne, 422 NW2d 840, (SD 1988) (Sabers, J., dissenting). The other acts evidence constituted separate, independent, uncharged criminal acts which created an impermissible propensity inference. Ondricek, 535 NW2d at 880 (Sabers, J., dissenting)
[¶46.] The other acts evidence served only to paint Steichen as a sick, bad man. See Werner, 482 NW2d at 297 (Sabers, J., dissenting) (stating that "[t]he prior bad acts testimony in this case painted the defendant not only as a bad man but also as an evil and conniving man.") The other acts evidence was not offered in rebuttal, but was presented in the State's case-in-chief. The State took a shotgun approach of bombarding the jury with other acts evidence creating the impermissible inference that because Steichen was a "bad man" he must have committed the charged acts.
[¶47.] Allowing the use of other acts evidence in the State's case-in-chief put Steichen in an adverse position where he had to defend against numerous uncharged acts and was incapable of receiving a fair trial. See Werner, 482 NW2d at 296 (Amundson, J., concurring in part and dissenting in part). The prejudicial effect of this evidence so outweighed any probative value that Steichen was denied the fair trial guaranteed by the United States #20347 Constitution and the South Dakota constitution.

[¶48.] As I have previously stated:

> The South Dakota Legislature could, within constitutional limits, make all prior bad acts admissible in sex molestation cases. It could do so simply by enacting a law which states that all such evidence is admissible without regard to relevancy, materiality and prejudice. However, until the legislature does so, we should enforce the law and require the prosecutor to prove relevancy, materiality and that the prejudicial effect of such evidence does not substantially outweigh its probative value.

Werner, 482 NW2d at 297 (Sabers, J., dissenting) (citing omitted). The majority opinion is throwing out our recent strides in Moeller and Chamley of preventing the exceptions to SDCL 19-12-5 from swallowing the rule of general inadmissibility of other acts evidence.

[¶49.] Steichen was denied a fair trial by the admission of other acts evidence. The other acts evidence was not relevant to a material issue and created an impermissible propensity inference. It is unnecessary to reach the other issue raised by Steichen because we should reverse on the issue of other acts evidence and remand for a new, fair trial.

AMUNDSON, Justice (dissenting).

[¶50.] I dissent.

[¶51.] In regards to the general inadmissibility of prior acts, this Court hit the nail on the head when it stated in Moeller:

> Generally, evidence of crimes or acts other than the ones with which the defendant is charged are inadmissible, unless certain exceptions apply. ... Under [SDCL 19-12-5}, prior bad acts evidence is not admissible to show that, merely because a defendant committed a similar offense on another occasion, he has a propensity to commit the offense charged.

1996 SD 60, ¶ 12, 548 NW2d 465, 471 (citations omitted).

[¶52.] This general rule of excluding prior acts rests on sound policy and constitutional principles:

> Introduction of evidence that the defendant committed other crimes and unwholesome acts may lead jurors to return a verdict of guilty for reasons other than finding all the elements of the alleged crime beyond a reasonable doubt. Although reasonable doubt of guilt exists on this occasion, the jury might conclude the defendant is a "bad man," who deserves punishment regardless of his innocence of the crime charged and warrants imprisonment to prevent future maleficent acts. Such results defeat the letter and policy of substantive criminal law mandating conviction based upon a non-vague concrete statute; instead, jurors have found the defendant

> guilty based upon past unsavory acts without necessarily violating any criminal statute in the process. Alternatively, and just as improperly, upon learning that the accused committed other crimes or wrongs, jurors might infer that the defendant has a propensity to commit crimes and probably committed this crime as charged.

State v. Werner, 482 NW2d 286, 295 (Amundson, J., concurring in part and dissenting in part) (quoting Patterson, Evidence of Prior Bad Acts: Admissibility Under the Federal Rules, 38 Baylor LRev 331, 332-33 (1986)).

[¶53.] In this case, the trial court found the prior acts relevant to show "motive, common plan or scheme, opportunity, absence of mistake or accident, and continuing course of criminal conduct." However, there was never any showing why the prior acts were needed to show a material element of the crime charged. Instead, the court merely listed possible uses creating a 'smorgasbord' of choices in the hope that a least one would fit. I have previously expressed my less than enthused opinion of this 'smorgasbord' approach to admission of other acts evidence. See, Werner, 482 NW2d at 296 (Amundson, J., concurring in part and dissenting in part). As stated in Werner:

> Particularly to be deplored is what might be called the 'smorgasbord' approach to analysis of other crimes evidence in which the court simply serves up a long list of permissible uses without any attempt to show how any of them are applicable to the case at hand. ... What is to be avoided is the mere listing of possible uses in the hope that at least one will seem to the reader to be applicable to the facts of the instant case.

Id. (quoting 22 C. Wright & K. Graham, Federal Practice and Procedure, § 5240 at 479 (1978)). Under this guise, forbidden propensity evidence is allowed in.

[¶54.] The majority claims motive was relevant to prove intent in the present case. The Majority attempts to distinguish Moeller, 1996 SD 60, ¶ 36, 548 NW2d at 477, on the basis that forensic evidence was available to establish intent, while, in the present case there was no such forensic evidence. In Moeller, the victim, of course, was not available to testify. In the present case, the victims were available to testify and did, in fact, testify. Such testimony serves the purpose the forensic evidence served in Moeller. The majority's attempt to distinguish Moeller on such a basis is simply a ruse, the result of which is to allow in propensity evidence.

[¶55.] In the well-reasoned case of, United States v. Sumner, 199 F3d 658, 661 (8thCir 1997), the Eighth Circuit Court of Appeals held that evidence of prior acts was not admissible to establish motive when intent was not at issue because the defendant denied the criminal act. The court stated:

> Motive, accident, and mistake were not at issue, because if the acts of abuse against [victim] occurred, there can be little doubt regarding [defendant's] motive and the criminality of the acts. ... The evidence therefore does not more than show that [defendant] has "a propensity to commit crimes, which Rule 404(b) prohibits."

Sumner, 119 F3d at 661 (citation omitted). In the present case, the defendant denied the acts occurred, thus, intent was not in dispute. To allow the prior acts in as relevant to establish motive does not more than show a propensity to commit crimes which SDCL 19-12-5 prohibits.

[¶56.] The other acts evidence was erroneously admitted and unlike the majority claims, it is far from harmless. By allowing in these prior acts, the defendant is forced to defend against numerous uncharged acts that deal only with propensity. There is no question the conduct charge dis despicable, sickening and totally unacceptable. However, when the prior acts do not fit within an exception and serve only to establish propensity, admission of the evidence is erroneous.

[¶57.] I also join in the dissent of Justice Sabers.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)ss	
COUNTY OF AURORA	)	FOURTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

ROBERT STEICHEN,
Defendant.

CASE NO. 97-08

DECISION OF STATE'S MOTION FOR ADMISSION OF DEFENDANT'S OTHER ACTS

THE ABOVE MATTER having come on for hearing before this Court at the Aurora County Courthouse, Plankinton, South Dakota, on the 29th day of May, 1997, at 1:00 p.m.; the Defendant being present in person and represented by Rodney Freeman, Jr., and the State being represented by Anthony M. Sanchez and Daniel J. Gels, Assistants Attorney General, as prosecuting attorneys; and the Court having heard arguments of counsel, and having reviewed the State's Motion for Admission of Defendant's Other Acts, and its Affidavit in Support and Brief in Support thereof, and being fully advised in the premises, the Court now makes and enters its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

I

That the following initials correspond to the following minor witnesses:

1. HF, the victim,
2. MF, the victim's older sister and step-daughter of the Defendant,
3. BS, the victim's younger step-sister and natural daughter of the Defendant,
4. KC, a baby-sitter,
5. BC, younger sister of KC and a baby-sitter,
6. KB, friend of KC and BC, and
7. CP, step-son of the Defendant from his first marriage.

II

That the Defendant has been charged by indictment on file herein with three counts of RAPE IN THE FIRST DEGREE against HF, his six year old step-daughter, and that these offenses consist of one act of fellatio and two acts of anal sodomy occurring on or between January 10, 1997, and February 12, 1997, in the family residence in Plankinton, South Dakota.

III

That HF will testify that between June, 1995, and December, 1996, in the family residence at 23638 392 Ave., Woonsocket, Jerauld County, South

Dakota, the Defendant had her perform fellatio upon him and anally sodomized her "ten times," her then being 4 to 5 years old and his step-daughter.

IV

That HF and MF will testify that on or about February 11, 997, the Defendant told HF that if she told anyone about his sexual assaults upon her he would kill her.

V

That MF will testify that between March and December, 1993, in the family residence at 202 W. 10th St., Woonsocket, South Dakota, the Defendant first performed cunnilingus upon her, her then being 8 years old and his step-daughter.

VI

That MF will testify that between December, 1993, and June, 1995, in the family residence at 100 W. Main St., Woonsocket, South Dakota, the Defendant anally sodomized her, her then being 8 to 10 years old.

VII

That MF will testify that between March, 1993, and June, 1995, in the family residences at 202 W. 10th St. and 100 W. Main St., Woonsocket, South Dakota, the Defendant performed cunnilingus upon and anally sodomized her "five or six times," her then being 8 to 10 years old.

VIII

That MF will testify that between March, 1993, and June, 1995, the Defendant told her that if she told anyone about his sexual assaults upon her "he would go to jail about 32 years or something like that, and after he got out, he would hunt (her) down and kill (her)."

IX

That Phyllis Steichen, the Defendant's spouse, will testify that the Defendant threatened her by saying that "[h] e would hunt her down."

X

That MF, KB, KC, BC and Phyllis Steichen will testify that the Defendant has physically struck MF and has struck her mother, Phyllis Steichen, in MF's presence.

XI

That MF, Phyllis Steichen, and Deputy Sheriff Ernest Anderson will testify that on or about February 17, 1993, the Defendant struck HF, her then being 2 years old, on the buttocks with his hand and with a book, causing abrasions and bruising, said assault being the basis of a conviction for simple assault in Sanborn County on September 8, 1993.

XII

That BS will testify that between June, 1995, and February, 1997, in the family residences at 23638 392 Ave., Woonsocket, Jerauld County, and RR 1, Box 8, Plankinton, South Dakota, the Defendant penetrated her vagina

digitally and with a foreign object, had her perform fellatio upon him and did or attempted to have intercourse with her and anally sodomize her, her then being 3 to 4 years old and his natural daughter.

XIII

That Laura M. Reis will testify that on or about June 19, 1992, in the family residence at 302 W. 3rd St., Woonsocket, South Dakota, the Defendant had vaginal intercourse with her, her then being 14 years old and his children's baby-sitter.

XIV

That Laura M. Reis will testify that between June and August, 1993, at the residence of Michael S. Hirsch in Huron, South Dakota, the Defendant had vaginal intercourse with her, her then being 15 years old.

XV

That Laura M. Reis will testify that between June, 1992, and August, 1993, the Defendant performed cunnilingus upon her, her then being 14 to 15 years old.

XVI

That KC will testify that about but prior to June 27, 1996, in the family residence at 23638 392 Ave., Woonsocket, Jerauld County, South Dakota, the Defendant forced her to perform fellatio upon him, her then being 14 years old and his children's baby-sitter.

XVII

That KC will testify that during July, 1996, in the family residence at 23638 392 Ave., Woonsocket, Jerauld County, South Dakota, the Defendant forcibly had vaginal intercourse with her, her then being 15 years old.

XVIII

That KC will testify that during August, 1996, in the family residence at 23638 392 Ave., Woonsocket, Jerauld County, South Dakota, the Defendant forcibly anally sodomized her her then being 15 years old.

XIX

That KC will testify that during January, 1997, in the family residence at 23639 392 Ave., Woonsocket, Jerauld County, South Dakota the Defendant forcibly had vaginal intercourse with her, her then being 15 years old.

XX

That BC will testify that between June, 1995, and January, 1997, in the family residence at 23639 392 Ave., Woonsocket, Jerauld County, South Dakota, the Defendant rubbed her leg, grabbed her breast, tried to kiss her, and told her to pull her pants down, her then being 13 to 14 years old and his children's baby-sitter.

XXI

That BC will testify that between June, 1995, and January, 1997, the Defendant told her not to tell anyone about his sexual assaults upon her, and

after she told him she already had he replied that if the police found out about his assaults and he lost his children he would get revenge upon the person who told the police.

XXII

That KB, KC and BC will testify that on or about February 18, 1997, at the "Randall Foods" parking lot in Mitchell, South Dakota, the Defendant told KC and BC not to tell anyone about his sexual assaults upon them and threatened, "If he ever got his kids taken away, he would make sure something would happened to them."

XXIII

That CP will testify that on or about January, 1989, in Huron, South Dakota, the Defendant anally sodomized and performed fellatio upon him, his then being 6 years old and the Defendant's step-son.

XXIV

That Tina Ryan will testify that on or about November 5, 1988, in a third party's vehicle, parked in Huron, South Dakota, the Defendant forcibly had vaginal intercourse with her, her then being 17 years old.

Based upon the foregoing Findings of Fact, when considered with the allegations contained in the Indictment on file herein, the Court now makes the following:

CONCLUSIONS OF LAW

I

That the Findings of Fact set forth above have been established by plain, clear and convincing evidence.

II

That the prior acts of sexual assault committed by the Defendant against HF, MF, BS, CP, Laura M. Reis and Tina Ryan, as more specifically described in the Findings of Fact set forth above, are relevant to show that the Defendant's motive was an unnatural and perverted sexual preoccupation with children, and with the acts of vaginal intercourse, fellatio, cunnilingus and anal sodomy therewith.

III

That the prior acts committed by the Defendant, as more specifically described in the Findings of Fact set forth above, are relevant to show that the Defendant had a common scheme and plan to sexually assault children by having vaginal intercourse with them, anally sodomizing them, performing cunnilingus upon them, having them perform fellatio upon him, and then threatening them with harm should they reveal his acts, such threats intended to not only silence his victims but to exercise psychological control over them, and to further commit physical assaults upon his family members, such acts also intended to not only physically hurt his victims but to exercise psychological control over them and those witnessing such assaults.

IV

That the prior acts are relevant to show that the Defendant had the opportunity to commit these acts by isolating his victims in an unoccupied part of his residence, and/or when others in the residence were asleep, and/or when his spouse was absent from the residence.

V

That the prior acts are relevant to show that no instance for which he has been indicted occurred as a result of a mistake or an accident

VI

That the prior acts are relevant to show that the acts for which he has been indicted are a continuing course of criminal conduct.

VII

That, when considering the specific and overall prior acts, their similarity, their occasions and locations, and their nature, it is apparent that their probative value substantially outweighs the potential for unfair prejudice.

VIII

That, in light of State v. Moeller, 1996 SD 60,548 N.W.2nd 465 (1996), the prior acts, as more specifically described in the Findings of Fact set forth above, are substantially similar and any dissimilarities are inconsequential, such specific similarities being graphically illustrated below:

	Tina Ryan	CP	Laura Ries	MF	HF	BS	KC	BC
Female	X		X	X	X	X	X	X
Acquainted		X	X	X	X	X	X	X
Child	X	X	X	X	X	X	X	X
Step-child		X		X	X	X		
Baby-sitter			X				X	X
Isolated	X	X	X	X	X	X	X	X
In residence		X	X	X	X	X	X	X
Anal sodomy		X		X	X	X	X	
Feliatio		X			X	X	X	
Cunnilingus			X	X				
Intercourse	X		X			X	X	

Other sexual acts						X		X
Threatened				X	X		X	X
Witnessed violence				X	X	X	X	X

IX

That the prior acts, as more specifically described in the Findings of Fact set forth above, are not too remote in time from the charges contained in the Indictment as they all relate to a similar intent or objective on the part of the Defendant, and that these prior acts are not isolated incidences, but rather, consist of a continuum of similar sexual assaults over the years.

X

That the prior acts are relevant to material facts and issues presented in the charges contained in the Indictment filed herein, particularly, whether the Defendant committed the sexual acts against HF as alleged in the Indictment.

XI

That there is no other evidence of equal probative value to this evidence of prior acts that could be introduced to prove the charges contained in the Indictment.

XII

That the introduction of evidence of these prior acts will not confuse the issues, mislead the jury or cause undue delay, and will not constitute a needless presentation of cumulative evidence at the trial of the charges herein.

XIII

That the prior acts committed by the Defendant, as more specifically described in the Findings of Fact set forth above, may be introduced by the State at the trial of the Defendant for the charges contained in the Indictment on file herein.

Dated this _____ day of May, 1997.

BY THE COURT:

/S/ Ronald K. Miller
Ronald K. Miller
Circuit Court Judge

ATTEST:

/s/ Janice Pecenka
Janice Pecenka
Clerk of Courts
(SEAL)

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

STATE OF SOUTH DAKOTA,	)	**ORDER DENYING**
Plaintiff and Appellee,	)	**PETITION FOR REHEARING**
	)	
vs.	)	**#20347**
	)	
ROBERT STEICHEN,	)	
Defendant and Appellant.	)	

- -

A petition for rehearing in the above cause having been filed January 11, 1999, and no issue or question of law or fact appearing to have been overlooked or misapprehended, and more than fifteen days having elapsed therefrom and no written statement having been filed with the Clerk of this Court by a majority of the justices requesting a rehearing, now, therefore, in accordance with the Rehearing Procedure Rule of this Court, the petition for rehearing is denied.

DATED at Pierre, South Dakota, this 2nd day of February, 1999.

BY THE COURT:

/s/ Robert A. Miller

Robert A. Miller, Chief Justice

ATTEST:

/s/ Dorothy A. Smith
Clerk of the Supreme Court

BY: /s/ Lisa Jackson
Chief Deputy Clerk
(SEAL)

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
FEB - 2 1999

/s/ Dorothy A. Smith
Clerk